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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners' Brief on the Merits

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 555 F.2d 687, and reproduced at page 108 of the Joint Appendix. The Court of Appeals' order denying Greyhound's Petition for Rehearing with Suggestion for Rehearing en Banc is unreported; a copy is reproduced at page 141 of the Joint Appendix.

There is no reported decision of the District Court. Copies of its memoranda and orders denying Greyhound's post-trial motions and concerning attorneys' fees are reproduced in the Joint Appendix at pages 87 and 104, respectively.

JURISDICTION

The Court of Appeals' judgment was entered on June 9, 1977. A timely Petition for Rehearing with Suggestion for Rehearing en Banc was denied on August 3, 1977. The petition for certiorari was filed on October 25, 1977, and was granted on January 9, 1978, limited to Question 3 presented by the petition. This Court has jurisdiction to review the judgment in question under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are Sections 4B and 5(i) (formerly Section 5(b)) of the Clayton Act, 15 U.S.C. §§ 15b and 16(i). They are set out verbatim in Appendix A, and pertinent portions of Section 16(i) are quoted in connection with the question presented.

QUESTION PRESENTED

Certiorari was granted as to Question 3 of the petition. That question asks whether the statute of limitations was tolled in this action by reason of 15 U.S.C. § 16(i), which provides that:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private . . . right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended . . . ." 15 U.S.C. § 16(i)

Did the Court of Appeals properly hold that the statute was tolled by virtue of Section 16(i) from the date on which the United States filed a petition for leave to intervene in an administrative proceeding previously instituted by Mt. Hood[1] pursuant to and for the purpose of enforcing the Interstate Commerce Act where the United States' petition complained of nothing, made no charges and sought no relief?

STATEMENT OF THE CASE

This is a private antitrust action brought by Mt. Hood against Greyhound in the District Court for the District of Oregon under Section 4 of the Clayton Act, 15 U.S.C. § 15.

Mt. Hood and Greyhound Lines, Inc., are motor common carriers of passengers and express, operating under authority from and regulation by the ICC. Mt. Hood's principal routes run between Portland, Eugene and Albany, Oregon in the West and Salt Lake City, Utah in the East, and between Klamath Falls, Oregon in the South and Biggs and The Dalles, Oregon in the North.

Greyhound Lines, Inc., is wholly owned by The Greyhound Corporation, a diversified holding company. *See California Parlor Car Tours Co.*, 93 M.C.C. 392 (1963). (R. 1937-1939) Greyhound Lines has routes serving Portland, Eugene, Salt Lake City, Klamath Falls, Biggs and The Dalles over which it competes with Mt. Hood.

Between 1947 and 1954, Greyhound acquired ownership and control of eight bus lines in the western United States. Notwithstanding protests by Mt. Hood, the ICC approved the acquisitions, holding that they would benefit Greyhound and the public by producing economies, coordination and improvement of service. *See The Greyhound Corp.*, 50 M.C.C. 123, 140 (1947) (R. 1862); *The Greyhound Corp.*, 58 M.C.C. 809 (1952) (R. 1895-1904); *The Greyhound Corp.*,

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1. Respondent Mt. Hood Stages, Inc., doing business as Pacific Trailways, will be referred to as "Mt. Hood". Petitioners The Greyhound Corporation and Greyhound Lines, Inc., together will be referred to as "Greyhound".

45 M.C.C. 821 (1947); *The Greyhound Corp.*, 55 M.C.C. 801 (1948); *The Greyhound Corp.*, 55 M.C.C. 321 (1948); *The Greyhound Corp.*, 59 M.C.C. 657, 668-670 (1953); *The Greyhound Corp.*, 60 M.C.C. 643, 650-653 (1954).[2]

After unsuccessfully protesting to the ICC against most of those Greyhound acquisitions, Mt. Hood continued to complain about the manner in which Greyhound was quoting service and routing passengers over the acquired lines. From 1955 on, Mt. Hood repeatedly complained that Greyhound had instructed its agents in Oregon not to quote Mt. Hood's service, that it was not routing traffic over Mt. Hood's lines, and that these practices violated assurances Greyhound had given to the ICC in the acquisition cases. (Exs. 197, 215, 297, 303-A)

When Greyhound terminated a joint through bus arrangement with Mt. Hood effective September 8, 1964, Mt. Hood petitioned the ICC under Section 5(10) (formerly 5(9)) of the Interstate Commerce Act, 49 U.S.C. § 5(10), to reopen the acquisition cases "for further hearing to consider the necessity of attaching certain terms, conditions and limitations to the privileges therein granted . . . ." (A. 4. *See also* Mt. Hood's amended petition, A. 24)

On December 14, 1964, the United States filed a petition for leave to intervene in the ICC proceedings, urging the ICC to hold a hearing on the matter for the benefit of both parties. (A. 37-38) Its petition expressly declined to take a position on the merits of Mt. Hood's allegations. (A. 37) On May 27, 1965, the United States was given permission to intervene in the ICC proceeding, but the ICC specifically limited it to the Interstate Commerce Act issues raised by Mt. Hood's petition. (A. 43) The ICC rendered its decision

2. The relevant opinions and orders are in the record. Tr. 2197; R. 1844, *et seq.*

on Mt. Hood's petition in 1968. It found that each of the acquisitions had been approved as consistent with the public interest, and it declined to revoke any of those prior approvals. Instead, it entered a supplemental order under Section 5(10) of the Interstate Commerce Act modifying its prior orders and requiring Greyhound to conform to the public interest with respect to the joint through service, schedule connections and the quotation of Mt. Hood's service. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 450, 462-463 (1968), *aff'd sub nom. Greyhound Lines, Inc. v. United States*, 308 F. Supp. 1033 (N.D. Ill. 1970).

Mt. Hood filed its original complaint in this action on July 5, 1968 (A. 46), and its last amended complaint on July 27, 1971 (A. 57). The case was tried before a jury in 1973, on the issue of alleged violations of Sections 1 and 2 of the Sherman Act, fraudulent concealment and damages. The jury returned a liability verdict for Mt. Hood. On the issue of alleged fraudulent concealment the jury found that Mt. Hood knew or should have known of its claims on December 14, 1960. (A. 82) The trial court, however, awarded Mt. Hood treble damages of $13,146,090 for the twenty-year period from 1953 to 1973. (A. 83, 86) It held that the government's petition to intervene in the ICC modification proceedings on December 14, 1964, tolled the statute of limitations under Section 5(i) of the Clayton Act. (A. 80) The result was that the four-year period was extended backwards in time to December 14, 1960 (the very day Mt. Hood was found to have discovered its claims), where it was combined with the "fraudulent concealment" to create a twenty-year damage period. The trial court then denied Greyhound's post-trial motions for judgment notwithstanding the verdict and for a new trial and awarded Mt. Hood

attorneys' fees of $1,250,000. (A. 87, 104-105) The Court of Appeals affirmed. (A. 108)

SUMMARY OF ARGUMENT

The Court of Appeals' decision holding the statute of limitations tolled under 15 U.S.C. § 16(i) by reason of the government's petition for leave to intervene in the ICC modification proceedings is directly contrary to the clear terms and requirements of that statute. The ICC proceedings were neither a civil or criminal proceeding "instituted by the United States," nor a proceeding "to prevent, restrain, or punish violations of any of the antitrust laws." Moreover, this antitrust case is not based on "any matter complained of in said proceeding," because the government's petition for leave to intervene in the ICC administrative proceedings did not complain of anything.

The Court of Appeals' decision is not only bad law, it is also bad policy. It would cause the four-year statute of limitations to be suspended in countless unforeseeable circumstances whenever the Antitrust Division of the Department of Justice participated in administrative proceedings. Such an open-ended expansion of the statute of limitations is directly contrary to the policies of repose and certainty that Congress sought to effectuate when it enacted a four-year statute.

ARGUMENT

I. The Court of Appeals' Decision Is Contrary to 15 U.S.C. § 16(i).

Tolling of the statute of limitations under Section 16(i) was essential to the award of all damages beyond the normal four-year period—some $5,194,617 after trebling. Section 16(i) provides:

> "Whenever any civil or criminal proceeding is *instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws,* but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action arising under said laws and *based in whole or in part on any matter complained of in said proceeding* shall be suspended during the pendency thereof and for one year thereafter. . . ." 15 U.S.C. § 16(i)[3]

Not one of the statute's explicit requirements is satisfied here. The relevant facts are as follows:

On or about October 7, 1964, Mt. Hood filed with the ICC a "petition . . . for an order reopening [the Greyhound acquisition cases] for further hearing to consider the necessity of attaching certain terms, conditions and limitations to the exercise of the privileges therein granted . . . ." (A. 4. *See also* A. 23-24) On December 14, 1964, the United States petitioned for leave to intervene. The petition did not allege that Greyhound was violating the antitrust laws (or any other law), and it sought no relief or remedy against Greyhound. (A. 36, *et seq.*) It took no position on the merits of the dispute between Mt. Hood and Greyhound and expressly disclaimed any knowledge of the matters complained of by Mt. Hood:

> "We have no way of knowing whether those of Mt. Hood's allegations which Greyhound denies are true or false; resolution of such controversies is a typical function of a hearing." (A. 37-38)[4]

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3. All emphasis in this brief is added unless otherwise stated.

4. The government's primary purpose in seeking to intervene was to urge the ICC not to dispose of the case by summary action, but to hold a full hearing for the benefit of *both* parties, to determine "if" the evidence supported Mt. Hood's allegations. (A. 37-38, 40)

The United States was not permitted to intervene until May 27, 1965. It raised no new issues. Indeed, the ICC obviously considered the proceeding to have been already instituted and its scope defined for it specifically limited the government's participation to the Interstate Commerce Act issues Mt. Hood had raised:

> "[T]he permission to intervene herein granted shall not be construed to allow intervenors to introduce evidence which will unduly broaden the issues raised in this proceeding." (A. 43)[5]

The Court of Appeals held that these facts activated Section 16(i) and tolled the statute of limitations commencing December 14, 1964, the date on which the petition for leave to intervene was first filed, and four years to the day after the date on which Mt. Hood was later (coincidentally) found by the jury to have "discovered" its cause of action.

It is axiomatic that "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J., concurring). The Court of Appeals failed to heed that principle; its interpretation is erroneous and contrary to Section 16(i) in every respect.

First, the holding applies Section 16(i) to a proceeding instituted by Mt. Hood, not the United States.[6] Indeed, the

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5. The ICC described those issues in its order assigning the matter for hearing:

> "[W]hether any supplemental order or orders should be issued *under section 5(9) of the Interstate Commerce Act* in any of the proceedings named in the attached appendix imposing or modifying conditions therein or an order issued *under any other appropriate section of the Act* in this proceeding with respect to whatever acts or facts *involving violation of the Act,* if any, may be proven at the said hearing." (A. 43)

6. Strictly speaking, the government sought permission to intervene in ICC approval proceedings "instituted" by Greyhound itself some ten to fifteen years earlier. (A. 36-37; pp. 3-4 above)

Court of Appeals specifically concedes that "Mt. Hood rather than the United States instituted the proceedings". (A. 133) A party who intervenes in a proceeding previously brought by someone else has not "instituted" that proceeding.

> "When the term [intervene] is used in reference to legal proceedings, it covers the right of one to interpose in, or become a party to, *a proceeding already instituted* . . . ." *Rocca v. Thompson,* 223 U.S. 317, 330 (1912).

Second, even if the United States could be said to have "instituted" the ICC proceeding, it did not "complain of" anything there on which this action is based. The decisions considering the applicability of Section 16(i) have uniformly held that the determination of whether a private action is based on matters "complained of" in a prior government action "in general . . . must be limited to a comparison of the two complaints on their face." *Leh v. General Petroleum Corp.,* 382 U.S. 54, 65 (1965); *accord, Luria Steel & Trading Corp. v. Ogden Corp.,* 484 F.2d 1016, 1022 (3d Cir. 1973), *cert. denied,* 414 U.S. 1158 (1974); *Rader v. Balfour,* 440 F.2d 469 (7th Cir.), *cert. denied,* 404 U.S. 983 (1971). Here, the United States' petition for leave to intervene did not charge Greyhound with any wrongdoing, took no position on the merits and sought no relief; therefore, this case is not based on any matter "complained of" by the government in the ICC proceeding, and Section 16(i) cannot apply to it. *Cf. Michigan v. Morton Salt Co.,* 259 F.Supp. 35, 44-45 (D. Minn. 1966), *aff'd sub nom. Hardy Salt Co. v. Illinois,* 377 F.2d 768 (8th Cir.), *cert. denied,* 389 U.S. 912 (1967) (Commencement of grand jury proceeding does not toll the statute under Section 16(i) because it is "investigative" and "has no immediate or direct goal of punishment, prevention, or restraint.").

Third, the Court of Appeals applied Section 16(i) to a proceeding brought under Section 5(10) of the Interstate Commerce Act, and which concerned only the enforcement of that Act. (A. 42-43) In no way could Mt. Hood's institution of that proceeding be considered an action to "prevent, restrain, or punish violations of any of the antitrust laws,"[7] and intervention by the United Stated did not change that. The United States was not seeking to have the ICC "prevent, restrain, or punish violations of any of the antitrust laws" either; indeed, it sought no relief at all. Moreover, the ICC is without power under Section 5 to enforce the Sherman Act; it enforces the Interstate Commerce Act and the National Transportation Policy. This Court has made that very clear:

> "[T]he [Interstate Commerce] Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems." *McLean Trucking Co. v. United States,* 321 U.S. 67, 79 (1944).

Finally, the Court of Appeals erred in holding that Section 16(i) comes into operation on the date on which the United States first sought leave to intervene. What is now Section 16(i) was enacted in 1914 pursuant to President Wilson's proposal which urged Congress to establish a procedure to give

> "private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government *where the Government has upon its own initiative sued the combinations complained of* and won its suit, and that the statute of limitations shall be suffered to run against such litigants only from the date of the conclusion of the Government's action. It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He cannot afford, he has not the power, to make use of such processes of inquiry as the Government has command of." 51 Cong. Rec. 1964 (1914).[8]

It is apparent that one purpose of Section 16(i) is to give private litigants an opportunity to use the results of government enforcement efforts. *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.,* 381 U.S. 311, 317 (1965). Here the government had no right to participate and could take no antitrust enforcement action at all in the ICC proceedings until the ICC granted its petition to intervene. *See* ICC Rule 72(e), 49 C.F.R. § 1100.72(e) (1976). Until that date no benefits could possibly result to private litigants. Thus, the mere filing of the petition bears no more "logical relationship" to the statutory language or purpose than does the final administrative approval to file the petition or any other earlier act evidencing the government's intention or desire to attempt to participate in the ICC proceedings. None of these is an act that falls within Section 16(i). *See Dungan v. Morgan Drive-Away, Inc.,* No. 76-2681 (9th Cir., Jan. 13, 1978) (empanelling grand jury does not toll statute) (App. B pp. 8-10); *Michigan v. Morton Salt Co.,* 259 F.Supp. 35, 44 (D. Minn. 1966), *aff'd sub nom. Hardy Salt Co. v. Illinois,* 377 F.2d 768 (8th Cir.),

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7. The "antitrust laws" as used in Section 16(i) are specifically limited to the Sherman Act, Clayton Act and parts of the Wilson Tariff Act (as amended). *See* 15 U.S.C. § 12. That list is exclusive. *Nashville Milk Co. v. Carnation Co.,* 355 U.S. 373, 375-376 (1958).

8. President Wilson's message was frequently quoted during the course of the congressional debates to explain the purpose of the amendments. *See, e.g.,* 51 Cong. Rec. 9090, 9488 (1914).

cert. denied, 389 U.S. 912 (1967).[9] The petition was not granted until May 27, 1965, and that is the earliest date on which it could be said that the government "instituted" any proceeding within the meaning of Section 16(i), assuming that such a petition could ever be said to have that effect.[10]

In sum, the ICC case involved neither a civil or criminal proceeding "instituted by the United States," nor any proceeding "to prevent, restrain, or punish violations of any of the antitrust laws." And this case is not based on "any matter complained of in said proceeding" because the government did not complain of anything there. The Court of Appeals' holding that Section 16(i) applies to a petition of the United States for leave to intervene in an agency proceeding previously instituted by plaintiff to determine possible violations of the Interstate Commerce Act, which makes no charges, seeks no relief and is restricted to the issues framed by plaintiff, is in flat conflict with Section 16(i).

9. The government's petition might have been denied. Had it been, the statute clearly would not have been tolled. *See Dungan v. Morgan Drive-Away, Inc.*, No. 76-2681 (9th Cir., Jan. 13, 1978) (App. B p. 8) The order granting intervention could not retroactively toll the statute, because by then it had already run and there was nothing to toll.

The *Dungan* case was decided by a different panel of the Ninth Circuit than the panel which decided this case. The *Dungan* opinion has not yet been officially reported; it is reproduced as Appendix B to this brief.

10. This point, by itself, would have two effects on the judgment here. First, since the jury found that plaintiff knew or should have known of its claims on December 14, 1960, those claims were time barred after December 14, 1964, and Section 16(i) cannot rescue them because the petition to intervene was not granted until May 27, 1965. Second, any tolling under the section would extend the claim period back only to May 27, 1961. Since there is no evidence of the amount of damage suffered in the period May 27, 1961, to July 5, 1964, the verdict and judgment to that extent reflect an incorrect damage period. (*See* A. 83)

II. The Court of Appeals' Decision Is Contrary to Congress' Intent and to Sound Policy.

The Court of Appeals chose not to follow the "literal wording" of Section 16(i). (A. 132) Instead, purporting to follow the teaching of *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), it relied upon its perception of the purpose of Section 16(i). It reasoned that tolling would serve the statute's purpose to permit "private litigants to have the benefits that may flow from governmental antitrust enforcement efforts" (A. 132-133), because it believed that the petition for leave to intervene was the "functional equivalent of a direct action." (A. 134) There are several defects in the Court of Appeals' reasoning.

First, while the statute's purpose may be salutary, it is not open-ended. It has explicitly defined limits, and therefore it will not support a decision so plainly contrary to the statute's terms as this one.

Second, the Court of Appeals has ignored the facts; the assumptions on which its reasoning rests are not valid. The government made no antitrust enforcement efforts here. It sought leave to intervene in a proceeding which in fact and by law was limited to the enforcement of the Interstate Commerce Act. Moreover, a petition such as this one, which made no complaint and which did not ask for any relief, is not remotely comparable to, let alone the "functional equivalent" of, a complaint filed in a federal court to punish or restrain antitrust violations.[11] Although the

11. The petition here is also obviously distinguishable from a Federal Trade Commission complaint brought to enforce the antitrust laws. *E.g., Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965). This case is also easily distinguished from cases holding the statute tolled by proceedings to enforce Section 5 of the Federal Trade Commission Act—assuming those cases were correctly decided. *See e.g., Luria Steel &*

Court of Appeals purported to rely upon "the substance of the government's intervention and participation before the Commission" in holding Section 16(i) applicable (A. 134), it ignored the fact that neither it nor the district court performed any analysis of the government's "participation" to determine whether it was the "functional equivalent of a direct action." Nor could any such analysis have been undertaken, for the record is devoid of any evidence of such participation.[12]

Third, Mt. Hood itself concedes that it derived no benefits from the government's intervention. Its expert witness on attorneys' fees, Mr. Blecher, testified:

Trading Corp. v. Ogden Corp., 484 F.2d 1016 (3d Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974); *Rader v. Balfour*, 440 F.2d 469 (7th Cir.), *cert. denied*, 404 U.S. 983 (1971); *Lippa's, Inc v. Lenox, Inc.*, 305 F.Supp. 182 (D. Vt. 1969). All of those cases were brought under the antitrust laws themselves or under Section 5 of the Federal Trade Commission Act, the "major purpose" of which, as perceived by those courts, "is to prevent antitrust law violations". *See, e.g., Lippa's, Inc. v. Lenox, Inc.*, 305 F. Supp. 182, 188 (D. Vt. 1969). In all those cases the government had actually charged the defendant with and sought the prevention or punishment of specific anticompetitive conduct or antitrust violations, and a comparison of the FTC's charges with the private litigant's complaint showed that the private action was based on the matter complained of by the FTC. Here, in contrast, the government made no such charges, and the proceedings were pursuant to Section 5 of the Interstate Commerce Act which, far from being designed to prevent antitrust violations, was designed to encourage and immunize conduct which would otherwise violate the antitrust laws. 49 U.S.C. § 5(12); *see Minneapolis & St. L. Ry. v. United States*, 361 U.S. 173, 187 (1959); *County of Marin v. United States*, 356 U.S. 412, 416 (1958).

12. The Court of Appeals says that the ICC "proceedings were of a kind likely to produce benefits to . . . plaintiff in a subsequent antitrust suit," and that "governmental investigative and legal resources were made available to fully develop the facts and the law favorable to the common position of the government and Mt. Hood on these issues." (A. 133) Nothing is cited to justify those statements; they are utterly without any support in the record. The government's petition did not endorse Mt. Hood's charges or assert any position in "common" with Mt. Hood. (pp. 7-8 above.)

> "My review of the record in this case indicates that not only did the plaintiff not have the benefit of any prior Government adjudication, but, in fact, this record formed the basis of a concomitant proceeding before the Interstate Commerce Commission in which the anti-trust division convened [sic], and in which it secured a contempt citation for the conduct involved.
>
> "So that I think actually, here, *you have no benefit from what the Government did,* but you were simultaneously preparing the Government case in the private case." (A. 103; Tr. 6819. *See also* A. 97, 103)

Thus, the Court of Appeals' decision does not serve Congress' purpose at all. Moreover, the Court of Appeals' policy approach is entirely one-sided. It gives no weight whatever to the important policies that underlie the 1955 amendments to the Clayton Act which amended Section 16(i) and established a uniform four year statute of limitations. As another panel of the Ninth Circuit has observed, those amendments demonstrate that

> "Although . . . [Section 16(i)] serves the broad and beneficient purpose of aiding private antitrust litigants . . . it is also true that it is a statute of repose." *Dungan v. Morgan Drive-Away, Inc.*, No. 76-2681 (9th Cir., Jan. 13, 1978) (App. B p. 5).

The Senate Report accompanying the 1955 amendments (H.R. 4954) reflects congressional policy against "undue prolongation of [antitrust] proceedings" by extending the limitations period:

> "While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and over-

burden the calendars of courts. The committee believes the provision of this bill will tend to shorten the period over which private treble-damage actions will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded.

"While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws." S. Rep. No. 619, 84th Cong., 1st Sess. 6 (1955). *See also* H.R. Rep. No. 422, 84th Cong., 1st Sess. 8-9 (1955).

The Attorney General himself supported the amendment. In a letter to Senator Kilgore, Chairman of the Senate Judiciary Committee, he stated in relevant part:

"Similarly, we favor enactment of a uniform statute of limitations. Currently, private antitrust action is *needlessly complicated* by issues such as which State's statute of limitations apply [sic], the events from which such statute run, and the *circumstances under which it may be told* [sic]. Finally, varying periods of limitations encourage 'forum-shopping' and seem ill-suited for enforcement of a uniform Federal policy." S. Rep. No. 619, *supra* at 7.

Accordingly,

"[I]n interpreting Section 16[(i)] [courts] must be guided not only by a Congressional intent to aid private litigants but also by its intent to make reasonably certain and predictable the determination of the duration within which a private antitrust suit must be brought." *Dungan v. Morgan Drive-Away, Inc.*, No. 76-2681 (9th Cir., Jan. 13, 1978) (App. B pp. 7-8).

The Court of Appeals' novel "functional equivalent" test fails to satisfy the congressional purpose of certainty and predictability. It would resurrect the very confusion and uncertainty respecting the application of the statute of limitations, including "the circumstances under which it may be tolled," that Congress sought to eliminate in 1955. It would require detailed review of the record in each proceeding to see what position the government ultimately took and whether the government's participation was or was not the "functional equivalent" of direct action. The government may be with one party on one issue, with the other on a second and with neither on a third. Or, it may change its position. For example, in *Denver & R.G.W.R.R. v. United States*, 387 U.S. 485 (1967), the government intervened in an ICC proceeding with one position, adopted another and then "completely reversed" itself before the case was concluded. 387 U.S. at 490-492. Thus, the Court of Appeals' decision would mean that it might be impossible to determine whether government proceedings would toll the running of the statute until those proceedings were finally resolved.[13] That creates more problems than it solves, as even the Court of Appeals seems to recognize. (A. 133, n. 31) *See Dungan v. Morgan Drive-Away, Inc.*, No. 76-2681 (9th Cir., Jan. 13, 1978) (App. B p. 10); *Cf. Leh v. General Petroleum Corp.*, 382 U.S. 54, 65 (1965). The uncertainty created by the decision below by itself provides a compelling reason to reverse it.

Finally, the ramifications of the Court of Appeals' extension of Section 16(i) are truly alarming. The number and

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13. Moreover, in some administrative proceedings, government participation may even occur without notice to the subsequent private treble-damage defendant, leaving him in a position where he had no reason to preserve records and other information necessary for his defense during the period of the administrative proceedings.

variety of regulatory proceedings in which the Justice Department participates to express its views are legion.[14] No one previously has even suggested that the statute of limitations was tolled by reason of such participation. Unless this Court acts, the Court of Appeals' decision will revive countless stale antitrust claims previously believed by everyone to be long since gone.

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14. The Associate Attorney General in charge of the Antitrust Division is charged with responsibility for:

> "Intervention or participation before administrative agencies functioning wholly or partly under regulatory statutes in administrative proceedings which require consideration of the antitrust laws or competitive policies, including such agencies as the Civil Aeronautics Board, Interstate Commerce Commission, Federal Communications Commission, Federal Maritime Commission, Federal Power Commission, Federal Reserve Board, Federal Trade Commission, Nuclear Regulatory Commission, and Securities and Exchange Commission, . . ." 28 C.F.R. § 0.40(b) (1976), as amended in 42 Fed. Reg. 15315 (March 21, 1977).

The Antitrust Division takes its responsibilities seriously. *See, e.g.*, Appendix F to the petition for certiorari.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded with instructions to eliminate any claim or award of damages for the period prior to July 5, 1964, and for further proceedings consistent with the decision.[15]

Respectfully submitted,

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15. Proceedings on remand should include consideration of whether Greyhound is entitled to a new trial due to the admission of vast quantities of highly prejudicial evidence of conduct which occurred well prior to the limitations period, and which would not have been admitted had the court properly interpreted Section 16(i). Virtually all of Mt. Hood's evidence related to pre-limitations events. Among other things, the trial court admitted into evidence government consent decrees entered in 1947 and 1957, seventeen and seven years, respectively, prior to the limitations period, as well as evidence of ICC approved acquisitions that were both expressly immunized from antitrust liability and time barred by more than ten years. The result was that Greyhound was condemned for past acts as to which Mt. Hood could not properly claim damages. *See International Shoe Machine Corp. v. United Shoe Machine Corp.*, 315 F.2d 449, 459-460 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963). At a minimum, proceedings on remand would include modification of the attorneys' fees award to reflect the change in the "result achieved." (A. 104)

Appendix

Appendix A

Statutes Involved

Section 4B of the Clayton Act, 15 U.S.C. § 15b, provides as follows:

> Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

Section 5(i) of the Clayton Act, 15 U.S.C. § 16(i), provides as follows:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

Appendix B

United States Court of Appeals,
Ninth Circuit.

J. M. DUNGAN, as Trustee for ABC Towing Service of Salinas, Inc., a bankrupt corporation,

Plaintiff-Appellant,

v.

MORGAN DRIVE-AWAY, INC., National Trailer Convoy, Inc., and Transit Homes, Inc.,

Defendants-Appellees.

No. 76-2681.
Jan. 13, 1978.

Appeal from the United States District Court for the Northern District of California.

Before HUFSTEDLER, SNEED and KENNEDY, Circuit Judges.

SNEED, Circuit Judge:

Plaintiff-appellant Dungan, as Trustee for the ABC Towing Service of Salinas, Inc., a bankrupt corporation, instituted this private antitrust treble damage action on August 20, 1975. It is acknowledged that any such action accrued no later than April 23, 1969, the date ABC Towing Service of Salinas, Inc. filed its petition in bankruptcy. The cause of action, therefore, appears barred because, as required by 15 U.S.C. § 16(b), it was not commenced "within four years after the cause of action accrued."

To avoid this conclusion plaintiff points to that portion of 15 U.S.C. § 16(a) which suspends the running of the statute of limitations during the pendency of "any civil or criminal proceeding . . . instituted by the United States" and for one year thereafter and contends that the empanelling on February 7, 1972 of the grand jury which subsequently indicated the defendant-appellees, suspended the running of limitations as of that date. This suspension, occurring within four years from the accrual date of the cause of action, should preserve the cause until the expiration of one year following the termination of the criminal proceeding. Inasmuch as these proceedings at the earliest were terminated by the appellees entering pleas of *nolo contendere* and being sentenced on September 27, 1974, a complaint filed on August 20, 1975 should be regarded as well within the permissible one year.

The defendants, however, insist that the empanelling of a grand jury did not suspend the running of limitations. Only an indictment so functions and in this instance the indictment was issued on August 2, 1973, a date more than four years subsequent to the date the cause of action accrued. The cause, therefore, should be barred by limitations the defendants contend.

Accordingly the defendants moved for summary judgment after the above facts were revealed by the complaint and developed through depositions. The motion was granted by the district court. We affirm.

I.

Purposes Served By Tolling Provisions of 15 U.S.C. § 16(b).

Plaintiff rests his case on the purposes Congress intended to serve in enacting those provisions of the Clayton Act

which now constitute 15 U.S.C. § 16(a) and (b).[1] Section 16(a) makes final judgments or decrees resulting from civil or criminal proceedings brought by the United States prima facie evidence in any action under federal law brought by a private party against the same defendant. Section 16(b), however, is not limited in scope to being only "a logical backstop for the prima facie evidence clause of 5(a) [15 U.S.C. § 16(a)]" *Minnesota Mining v. N. J. Wood Co.*, 381 U.S. 311, 319, 85 S.Ct. 1473, 1477, 14 L.Ed.2d 405 (1965). Its purpose has been described by the Supreme Court in *Minnesota Mining* as follows:

> "As we have pointed out, the textual distinctions as well as the policy basis of § 5(b) indicate that it was to serve a more comprehensive function in the congressional scheme of things. The Government's initial action may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. In fact, the rules of the Commission so provide. 16 CFR § 1.132(e). See generally 16 CFR § 1.131 et seq. Moreover, difficult questions of law may be tested and definitively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties."

Minnesota Mining v. N. J. Wood Co., supra, at 319, 85 S.Ct. at 1477. This purpose expresses a "desire that private parties be permitted the benefits of prior government actions." *Id.* at 320, 85 S.Ct. at 1478. Such a purpose, plaintiff insists, in this case can be served adequately only by interpreting the statutory language "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws" as embracing the empanelling of a grand jury. Only in that manner can a private party situated as is the plaintiff here get the full benefits of the government's prior actions.

Although the plaintiff is correct in asserting that 15 U.S.C. § 16(b) serves the broad and beneficent purpose of aiding private antitrust litigants, so as to use "private self-interest as a means of enforcement" of antitrust laws, *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751, 67 S.Ct. 1015, 1019, 91 L.Ed. 1219, it is also true that it is a statute of repose. This feature emerges clearly when one considers the purposes of the Act of July 7, 1955, 69 Stat.

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1. 15 U.S.C. § 16(a) and (b):

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

282, which amended 15 U.S.C. § 16(b). Prior to this Act § 16(b) merely suspended the running of the limitations period, the limits of which were fixed by state law. This led to considerable confusion in computing the correct period within which a suit was required to be brought.[2] To elimi-

2. S.Rep.No. 619, 84th Cong., 1st Sess. 2 (1955), *reprinted in* 1955 U.S.Code Cong. & Admin. News, pp. 2330, 2331.

"As previously indicated, the antitrust laws grant to private parties the right to bring a suit for treble damages to avenge injuries suffered through violations thereof. While this is a federally accorded right of action, at the present time private treble-damage cases are governed by State statutes of limitation.

Under this ruling a number of anomalous situations may arise. A plaintiff located in State A who is injured by a conspiracy may find himself barred by the local statute of repose, whereas an injured party in State B, wronged by the very same collusive action, may still have a valid cause of action. While this may be unjust insofar as plaintiffs are concerned, defendants fare little better under the rule. Where conspiracies occur on a nationwide level and it is determined that the limitation law of the place of injury governs the case, a plaintiff injured in several jurisdictions is permitted to select as his forum the State with the most favorable statute. In such cases, the defendant remains in constant jeopardy until the longest period of limitations has transpired. Also adding to the confusion is the frequently present problem of a conflict of laws in determining which State statute is controlling, the law of the forum or that of the situs of the injury.

Even when the State whose statute of limitations is applicable has finally been ascertained, there remains still another hurdle to be overcome, namely the selection of the appropriate law of the State that governs private treble-damage proceedings. The problem is complicated in many instances by virtue of the fact that statutes of limitation must frequently be chosen from those pertaining to the ancient common-law forms of action such as trespass to persons and property, damage to property, and actions in the nature of actions on the case. In those instances where the State law has established a special statute of limitations for actions upon a liability created by statute, the selection of the proper limitation period may be immeasurably easier. Even here, however, confusion as to the correct limitation period abounds.

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It is one of the primary purposes of this bill to put an end to the confusion and discrimination present under existing law where local statutes of limitations are made applicable to

nate this confusion the Act established a uniform statute of limitations of 4 years and provided the suspension of the statute would extend "during the pendency" of the federal civil or criminal proceeding and "for one year thereafter." Finally, the Act provided that, in the event the new uniform 4-year statute is tolled, "any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued." In this manner the termination date of the limitations period was designed to afford private litigants an opportunity to take advantage of the government's efforts and to make its calculation reasonably certain.[3]

We, therefore, in interpreting section 16(b) must be guided not only by a Congressional intent to aid private litigants but also by its intent to make reasonably certain and predictable the determination of the duration within

rights granted under our Federal laws. This will be accomplished by establishing a uniform statute of limitations applicable to all private treble damage actions as well as Government damage actions, of 4 years."

3. S.Rep.No. 619, 84th Cong., 1st Sess. 2 (1955), *reprinted in* 1955 U.S.Code Cong. & Admin. News, pp. 2330, 2332.

"This bill makes several important changes in the tolling provisions of existing law. As presently written section 5 of the Clayton Act tolls the statute of limitations with respect to private treble-damage suits during the pendency of a suit by the United States to punish or restrain violations of the antitrust laws. This period of tolling is continued by the present bill with several modifications.

There are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the Government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint. To alleviate

which a private antitrust suit must be brought. Our interpretation is important because, not only will it fix the period within which a suit may be brought, it also will affect, by fixing the duration of the period of suspension, the period of time with respect to which damages may be recoverable.

II.

Plaintiff's Interpretation Inconsistent With Section 16(b)'s Statute-of-Repose Purpose.

[1, 2] Plaintiff in effect argues that any interpretation which will extend the period within which a private suit can be brought serves to aid private litigants and is thus an interpretation intended by Congress. As indicated above, this ignores the statute-of-repose purpose of section 16(b). To serve that purpose we should eschew an interpretation which could introduce at another critical point in the calculation of the total period within which a suit may be brought a degree of uncertainty even greater than that which Congress eliminated in 1955. Plaintiff's expansive reading of Congressional intent undoubtedly would lead to just that. In calculating the expiration point of the time within which a suit may be brought uncertainty about when suspension of the running of the four-year statute commences would be as troublesome as were the uncertainties to which the 1955 Act was addressed.

Our description of the plaintiff's argument is not a straw-man we have devised to conceal the force of his position. It is true that the date of empanelling is a fixed and certain

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such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings."

date. The difficulty with its selection is that it bears no logical relationship to an event to which we can attach the statutory language "Whenever any civil or criminal proceeding is instituted to prevent, restrain, or punish violation of any of the trust laws, ..." Proceedings are "instituted" either before or after empanelling of the grand jury. Mere empanelling "institutes" nothing. It is either commencing the investigation, presenting to the grand jury, or returning the indictment that does that. If empanelling should be deemed meaningful *only* when an indictment ultimately is returned, it is the indictment which is the operative "institution" of proceedings, not the empanelling of the grand jury. To relate the date of the suspension back to the empanelling of the grand jury makes no more sense than relating it back to the date final administrative approval of the prosecution was given or any other earlier date with respect to which there exists proof that the government had determined to investigate possible antitrust violations by the defendant. On the other hand, if the date the grand jury is empanelled is deemed meaningful even if *no* indictment is returned then it is clear that it is merely an arbitrary date selected to signify that at some prior date the government decided to investigate the defendant for antitrust violations.

The short of the matter is that there exists little reason, other than it fits the needs of the plaintiff's case, to accept the date of grand jury empanelling as the date suspension commences. The date of the return of an indictment fits comfortably within the statutory language while empanelling the grand jury does not. The latter is not an act having as its purpose the prevention, restraint, or punishment of violations of the antitrust laws. The initiation of an investigation or a decision to prosecute more comfortably fits the statutory language than does empanelling the grand jury. Were we to select empanelling today, these more ap-

propriate times would be selected tomorrow. To select either, however, would introduce great uncertainty in fixing the time at which the suspension period commences. This would frustrate the statute-of-repose purpose of section 16(b). We decline to embark on a course that could lead to such an end.

III.

Practical Difficulties In Accepting Plaintiff's Position.

In reaching our conclusion we have also been influenced by a desire to avoid certain practical difficulties relating to grand jury secrecy which the plaintiff's position would involve. See Rule 6(e), Fed.R.Crim.P. (as amended Oct. 1, 1977). Section 16(b) suspends the limitation period "in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding . . . ." To determine whether proceedings before a grand jury involved "any matter complained of" upon which a private right of action is based in whole or in part, grand jury proceedings would be required to be carefully scrutinized. Moreover, considerable judicial time would be consumed in striking the exquisite balance between serving the objects of grand jury secrecy on the one hand and those of section 16(b), as interpreted by the Supreme Court in *Minnesota Mining Co.*, on the other. *Cf. U. S. Industries, Inc. v. United States District Court*, 345 F.2d 18 (9th Cir. 1965). This task would be especially difficult when no indictment of the antitrust defendant was returned. Plaintiff suggests an *in camera* proceeding (initiated undoubtedly in some instances by no more than uninformed suspicion) in which the trial court would sift the grand jury proceedings for "any matter complained of" on which the plaintiff's suit might be based. To an impractical degree the plaintiff's position imposes upon the trial court a

highly complex and difficult task whereas that task is relatively simple so long as we adhere to the date an indictment is returned as the date criminal proceedings which suspend the 4-year limitation period commence. *See State of Michigan v. Morton Salt Company*, 259 F.Supp. 35, 45 (D.Minn. 1966). Adherence to such a date may not eliminate all necessity to strike the exquisite balance in view of the teaching of *Minnesota Mining, Inc. and Leh v. General Petroleum Corp.*, 382 U.S. 54, 58-59, 86 S.Ct. 203, 15 L.Ed.2d 134 (1965); but it does confine the task to substantially more manageable proportions than would otherwise be the case.

Concerns rooted in a desire to improve judicial efficiency must occupy a low order of priority when either the commands of Congress or the insistent summons of justice so indicate; however, they occupy a high order when neither so do. This is the situation which this case presents.

AFFIRMED.